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No. 73-809

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

ANGELO ROSSI, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

Baker v. *United States*, 401 F.2d 958, on remand, 301 F.Supp. 973, after remand, 430 F.2d 499, certiorari denied, 400 U.S. 965	5
Barker v. *Wingo*, 407 U.S. 514	8, 9
Delli Paoli v. *United States*, 352 U.S. 232	5-6
Direct Sales Co. v. *United States*, 319 U.S. 703	7
Estes v. *United States*, 335 F.2d 608, certiorari denied, 379 U.S. 964	5
Krulewitch v. *United States*, 336 U.S. 440	6
Sheppard v. *Maxwell*, 384 U.S. 333	4
United States v. *Acuff*, 410 F.2d 463, certiorari denied, 396 U.S. 830	4-5
United States v. *DeCarlo*, 458 F.2d 358, certiorari denied, 409 U.S. 843	5
United States v. *Falcone*, 311 U.S. 205	6-7
United States v. *Frame*, 454 F.2d 1136, certiorari denied, 406 U.S. 925	7
United States v. *Marion*, 404 U.S. 307	8

Cases—Continued Page

United States v. *Olweiss*, 138 F.2d 798, certiorari denied, 321 U.S. 744 6

United States v. *Williams*, 435 F.2d 642, certiorari denied, 401 U.S. 995 6

Constitution and statutes:

U. S. Constitution:

Sixth Amendment 8

18 U.S.C. 2 3

18 U.S.C. 371 2

18 U.S.C. 2314 3

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 485 F.2d 260.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1973. A petition for rehearing was denied on October 24, 1973. The petition for a writ of certiorari was filed on November 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law as a result of the sequestration of the jury.

2. Whether petitioners were entitled to a mistrial following the severance of co-defendant Salerno.

3. Whether the trial judge erred in failing to grant petitioners' request for a charge on multiple conspiracies.

4. Whether the evidence supported petitioners' convictions for conspiracy.

5. Whether a two and one-half year delay between indictment and trial, which at least partially resulted from a one year delay by agreement between the parties and from the subsequent deaths of one of the defense counsel and of the judge who was handling the case, deprived petitioners of their right to a speedy trial.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners Angelo Rossi, Howard Silverman and William Silverman were found guilty of conspiring to transport stolen securities in interstate commerce (count 1), in violation of 18 U.S.C. 371.[1] Petitioner Rossi was

[1] Also charged with petitioners were Gerald Zelmanowitz, who pled guilty and testified for the government; Anthony Salerno, whose case was severed at trial when Zelmanowitz was unable to identify him; Gilbert Beckley and Joseph Green, whose cases were severed because they were fugitives from justice, and Jack Mase and Larry Bressler, who pled guilty during the trial.

also found guilty of various substantive counts (counts 3, 6, 7, 8 and 9) charging the transportation of stolen securities in interstate commerce, in violation of 18 U.S.C. 2 and 2314. Howard Silverman was sentenced to two years' imprisonment and William Silverman to three years' imprisonment. Petitioner Rossi was sentenced to a prison term of three years and a fine of $5,000 on count one and one year prison terms on each of counts three, six, and seven, to run consecutively to each other and to the term imposed on count one. In addition, the court sentenced Rossi to two years' probation on counts eight and nine, to commence on the date of Rossi's release on parole.

The evidence revealed a conspiracy to procure and sell stolen securities. At the core of this conspiracy were Zelmanowitz, Green, Beckley and Salerno. Beckley and Green solicited stolen securities and provided the funds to procure them. Zelmanowitz used his knowledge of the securities business and his connections with various banks and brokerage houses to sell the securities, and he employed Bressler to aid him in obtaining false documentation necessary for the transactions. Salerno used his underworld connections to insure that the persons from whom the group obtained stolen securities were dependable and would abide by their agreements with the group (Tr. 1603-1607, 1612-1614).

Mase (Tr. 1605) and petitioners all served as sources of the illegitimate securities for the core group. Petitioner Rossi supplied stolen securities

having an aggregate value of over $2,250,000 to Zelmanowitz and Beckley on two occasions, after having discussed the sale several times and after having been specifically told that the securities would be resold to brokerage firms (Tr. 1624-1630, 1680-1682, 1712). He also supplied Zelmanowitz with false identification in order to facilitate the resale (Tr. 1715). Similarly, the testimony of Zelmanowitz indicated that petitioners Howard and William Silverman sold some $400,000 worth of supposedly stolen but actually counterfeit Indiana Toll Road Bonds to the conspiracy with full knowledge that they were dealing with a conspiracy (Tr. 1656, 1659-1665, 1667-1668; Pet. App. 36; 485 F.2d 260, 262). Moreover, although they were paid immediately upon delivery of the securities, the amount petitioners received for the bonds was an agreed upon percentage of the proceeds the conspiracy anticipated realizing upon resale (Tr. 1629, 1661).

Petitioners each testified and denied any knowledge of or participation in the scheme to sell stolen securities (Tr. 2354, 2364, 2437-2440, 2451-2452, 2565-2568).

ARGUMENT

1. It is clear that a trial court has a duty to attempt to prevent prejudicial publicity from impairing a defendant's right to a fair trial. *Sheppard* v. *Maxwell*, 384 U.S. 333, 363. Among the measures a court may, in its discretion, employ to accomplish this goal is sequestration of the jury. *United States* v. *Acuff*, 410 F. 2d 463 (C.A. 6), certiorari denied,

396 U.S. 830; *Estes* v. *United States*, 335 F. 2d 609 (C.A. 5), certiorari denied, 379 U.S. 964.

In the present case there was a very real threat of substantial publicity. The case involved a witness (Zelmanowitz) who had previously received a great deal of publicity because of his testimony in the case of *United States* v. *DeCarlo*, 458 F. 2d 358 (C.A. 3), certiorari denied, 409 U.S. 843, which was also tried in the District of New Jersey. In addition, advertisements of a movie which ostensibly portrayed the lives of various underworld figures, including that of then co-defendant Salerno, were being published in the newspapers (Tr. 191-205). In view of these circumstances and the fact that petitioners have made no showing of prejudice, it cannot be said that the court's decision to sequester the jury constituted an abuse of discretion. See *Baker* v. *United States*, 401 F. 2d 958 (C.A.D.C.), on remand, 301 F.Supp. 973 (D. D.C.), after remand, 430 F.2d 499, certiorari denied, 400 U.S. 965.

2. Petitioners contend that the trial court's failure to grant their motions for mistrial after the severance of co-defendant Salerno constituted a denial of due process. Their argument seems to be that if Salerno were not a co-defendant, his function in the conspiracy could not be delved into, which would result in the case "being tried on the merits only as to the Silvermans and Rossi" (Pet. 20). This is, of course, incorrect.

A statement made by a co-conspirator in furtherance of a conspiracy may be used against the other conspirators. *Delli Paoli* v. *United States*, 352 U.S.

232; *Krulewitch* v. *United States*, 336 U.S. 440. This rule is not confined to the situation where the declarant and the other conspirator are co-defendants at the same trial. *United States* v. *Williams*, 435 F. 2d 642 (C.A. 9), certiorari denied, 401 U.S. 995; see also *United States* v. *Olweiss*, 138 F. 2d 798 (C.A. 2), certiorari denied, 321 U.S. 744. Therefore, in the case at bar, the government was free to show the role each participant in the conspiracy played, regardless of whether he was at that time a co-defendant. Thus, Salerno (or the person known to the conspirators as Salerno) could properly be shown to be the underworld "enforcer" of the parties promises, whether he was a co-defendant or not.[2]

3. Petitioners argue that the trial court erred in refusing to charge the jury on the issue of multiple conspiracies. This contention is fully answered in the opinion of the court below (Pet. App. A 36-38), on which we rely.

4. In the same vein, petitioners also contend that there is a variance between the indictment, which alleges a conspiracy, and the proof, which, according to petitioners, only shows sales to a conspiracy. Relying primarily upon *United States* v. *Falcone*, 311

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[2] Petitioners also suggest that the government, to gain some psychological advantage, joined the defendant Salerno knowing he was not the Salerno of the conspiracy. The record does not support this proposition (see Tr. 1539-1540), nor is it clear how such an error would benefit the government's position. Petitioners, however, have moved for a new trial alleging newly found evidence which supports that contention (Pet. 31-32). That motion is presently pending in the district court

U.S. 205, petitioners claim that "mere sales to a conspiracy already in progress do not make the sellers members of the criminal enterprise" (Pet. 26). This claim is also without merit.

In *Direct Sales Co.* v. *United States*, 319 U.S. 703, this Court rejected the argument that one who sells articles used by a conspiracy can never be found guilty of that conspiracy (*id.* at 709):

> The *Falcone* case creates no such sweeping insulation for sellers to known illicit users. That decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, *unless he knows of the conspiracy*; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. [Emphasis added.][3]

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and need not delay decision on the issues presented by this petition. See *United States* v. *Frame*, 454 F. 2d 1136 (C.A. 9), certiorari denied, 406 U.S. 925.

[3] The claim by petitioners that the "knowing sale" rationale would apply only to "contraband" is inaccurate (Pet. 27). This Court, in *Direct Sales Co.* did make a distinction between a seller of articles in normal trade, such as sugar, and a seller of "restricted commodities" such as narcotics. However, the Court did not say that the seller of a product in normal trade could not be convicted of conspiracy as a result; rather, the Court indicated that the seller of "restricted goods" could be found to be a co-conspirator on a lesser quantity of evidence than could a seller of normal goods. Moreover, this distinction will do petitioners no good because they, as vendors of stolen or counterfeit securities, would be classified as a seller of "restricted commodities" rather than as a seller of normal goods in trade.

There was ample evidence presented at trial to show that petitioners, although not aware of every detail of the scheme, realized they were dealing with a conspiracy when they sold the securities to the core group in exchange for a percentage of the profits (Tr. 1624-1629, 1656, 1659-1665, 1667-1668, 1680-1682, 1694-1695, 1707-1717; Pet. App. A 37-38).

5. Petitioners claim finally that their Sixth Amendment right to a speedy trial was violated. An analysis of the four factors held in *Barker* v. *Wingo*, 407 U.S. 514, to be the criteria to be used in evaluating such claims reveals this contention to be without merit.

The period of delay is calculated from the time of arrest or indictment of petitioners, not from the date at which the authorities first learned of the crime, as petitioners suggest. See *United States* v. *Marion*, 404 U.S. 307.[4] The delay thus calculated is two years and seven months, approximately half the delay involved in *Barker* v. *Wingo*.

The reasons for the delay are not entirely clear from the record, but petitioners concede that the first year of the delay was by agreement (Pet. 29).[5]

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[4] Moreover, since there is no claim that the witness Zelmanowitz's right to a speedy trial was infringed, the date of his arrest is irrelevant to the contention here advanced.

[5] There is a representation in the government's brief below that this initial delay of one year was at the request of Mr. Singer (counsel for Salerno) and was acquiesced in by the other defense counsel. As support for this proposition the government included as appendices to their brief copies of letters to and from Mr. Singer, which were not a part of the trial record.

Moreover, part of the remaining delay is explained by the deaths of one of the defense counsel (Tr. 174) and of Judge Shaw (Tr. 172), who was originally assigned the case and who handled all preliminary matters until his death on July 9, 1972. Petitioners make no claim that there was a deliberate attempt on the part of the government to delay the trial in order to gain some tactical advantage, as was claimed in *Barker* v. *Wingo.*

Contrary to petitioners' claim, it appears they made no attempt to assert their right to a speedy trial until April 1972, when they filed a motion to dismiss. This was over two years after the indictment and less than six months prior to trial.

Finally, petitioners make no showing of prejudice. None of them was incarcerated prior to or during trial, nor was there any claim of loss of witnesses or other evidence which would support their defense. All petitioners testified at trial, and a fair reading of the record discloses that they were able to recall their relationships to Zelmanowitz and others without difficulty (Tr. 2347-2360, 2429-2452, 2563-2569).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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